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PREPARATION AND ADOPTION OF A CONVENTION
ON ARREST OF SHIPS

Compilation of comments and proposals by Governments and by intergovernmental and non-governmental organizations on the draft articles for a convention on arrest of ships

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INTRODUCTION

1. This document sets out the comments and proposals on the draft articles for a convention on arrest of ships that were received between 16 October and 31 December 1998. In that period, comments were received from the Governments of Madagascar and Morocco.

COMPILATION OF COMMENTS AND PROPOSALS

Government of Madagascar

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Article 1 - Definitions

2. This article should also contain the definitions of the terms "demise charter", "manager" and "hypothèque" in order to avoid any ambiguity, since there is no obvious difference between them and the following terms:

"Demise charter and bareboat charter";

"Manager or operator of the ship";

"Mortgage and 'hypothèque'".

Article 3 - Exercise of right of arrest

3. The concept of "claim based on tort" which has been introduced in paragraph (1) (a) (v) should apply to the fines to which the ship and its crew are liable.

Article 4 - Release from arrest

4. The right of the person who has furnished security should be limited to the possibility of requesting that such security should be reduced. It would be pointless to ask him to provide security if, under the provisions of article 4, paragraph (5), he may apply to the court to have that security cancelled.

Article 6 - Protection of owners and demise charters of arrested ships

5. Paragraph (1) of this article should be amended so that the authorization to arrest a ship or maintain an arrest already effected is not systematically subject to the provision of security by the arresting claimant. It may happen that the claimant does not have the means to furnish security. This is the case of a crew member whose wages have not been paid.

6. Moreover, if the prior provision of security is necessary, the amount should not exceed that of the claim asserted.

7. The comments made on article 4 also apply to paragraph (5) of article 6.

Government of Morocco

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8. The draft convention is fairly important since it is worded in a clear and well arranged manner and article 1, in particular, contains a wealth of definitions that should help to eliminate any ambiguity that might impede the implementation of the convention.

9. However, we note that there are areas in which the convention conflicts with Moroccan private law. For example, while article 1 of the draft convention stipulates that ships may be arrested, as a conservatory measure, only in order to secure a maritime claim, Moroccan law permits the arrest of a ship, as a conservatory measure, regardless of the type of claim (article 110 of the Maritime Code).

10. Moreover, the same article 110 of the Moroccan Maritime Code conflicts with article 2, paragraph 1, of the draft convention, which stipulates that a ship may be arrested only by or under the authority of a court of the Contracting State in which the arrest is made, while the Moroccan Maritime Code also permits such arrest on the basis of an enforceable instrument.

11. Article 111 of the Moroccan Maritime Code also conflicts with the provisions of article 2, paragraph 3, since it does not permit the arrest of a ship from the time when its captain is granted permission to sail until the completion of the voyage, while we find that the draft convention totally contradicts that stipulation by permitting the arrest of a ship even though it is ready to sail or is sailing.

12. Moreover, article 4 of the draft convention stipulates that a ship may be released from arrest when security has been furnished and, in the absence of agreement between the parties, the latter may petition the court to determine the nature and amount of the security, which must under no circumstances exceed the value of the ship. In our view, this would serve the interests of a foreign owner or charterer of a ship to the detriment of the interests of a Moroccan claimant.

13. In short, the draft convention merely serves to protect the interests of developed countries, such as the United Kingdom and the United States of America, which have long-standing international maritime traditions or a large merchant marine fleet and, consequently, wish to protect their ships from the calamity of arrest, which would prevent them from operating. Hence, they are seeking to restrict the scope of application of the rules of arrest.

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Corrections by the Government of Morocco to its comments on the draft articles for a convention on arrest of ships

Corrigendum

Morocco wishes to stress that the draft convention is of especial interest since it is worded in a clear and very coherent manner. Moreover, article 1 contains several definitions that should avert any dispute relating to implementation of the convention.

1. Article 110 of the Moroccan Maritime Code stipulates that arrest is permissible regardless of the nature of the claim, whereas article 1 of the draft convention provides that arrest is permissible only when the claim is maritime in origin.

2. Article 2 of the draft convention provides: "A ship may be arrested ... only by or under the authority of a Court of the Contracting State in which the arrest is made", whereas article 110 of the Moroccan Maritime Code stipulates: "The arrest of a ship may be effected at any time either under an enforceable instrument or under the authority of the competent court ...".

3. Article 111 of the Moroccan Maritime Code of Commerce stipulates concerning seizure in execution: "A ship may not be seized in execution from the time when the captain receives permission to sail until completion of the shipment".

4. Article 4 of the draft convention provides that a ship which has been arrested shall be released when sufficient security has been furnished, and in the event of a dispute on this question the Court may determine the amount of security, which may in no circumstances exceed the value of the ship. This would be in the interest of a foreign owner or charterer and to the detriment of a Moroccan claimant.

In short, the draft convention on arrest protects the interests of the traditional maritime developed countries and those which have large fleets; they wish to protect their fleets from the adverse effects of arrest and are seeking to restrict the scope of its application, which may run counter to the interests of a Moroccan claimant in the event of a non-maritime claim.